No. 78-128

In the Supreme Court of the United States

OCTOBER TERM, 1978

KRANCO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 48) is unpublished. The decision and order of the National Labor Relations Board (Pet. App. 17-47) are reported at 228 NLRB 319.

JURISDICTION

The judgment of the court of appeals (Pet. App. 50-51) was entered on May 18, 1978. The petition

for a writ of certiorari was filed on July 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner discharged eleven of its employees because of their union activities in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 158, are set forth at Pet. 3.

STATEMENT

1. The Board, adopting the decision of the administrative law judge, found that petitioner engaged in conduct violative of Section 8(a)(1) of the Act, and that petitioner discharged eleven employees in violation of Section 8(a)(3) and (1). The underlying facts are as follows:

On February 19, 1976,[1] the Union[2] began an overt organizing campaign among petitioner's employees. Petitioner immediately became aware of this activity. A Union leaflet distribution on February 24 announced meetings to be held on February 26 with the day and night shift employees. At the meeting between Union representatives and the night shift employees, approximately 16 of the 30 night shift workers signed and submitted to the Union authorization cards; cards of several others on the night shift were provided by an employee organizer. Two days later, on March 1, another meeting was held with the night shift employees (Pet. App. 19; Tr. 144-149, 198, 408, 482).[3]

Petitioner's response was hostile. On Saturday, February 27, following the initial night shift meeting, night supervisor Michulka began asking employees about their and others' union opinions and activity, including an inquiry as to who was the Union leader on the night shift (Pet. App. 20-21; Tr. 163, 303-309, 412). And on Monday, March 1, one of the day supervisors interrogated an employee as to his union sympathies (Pet. App. 21-22; Tr. 290-291). On Tuesday, March 2, petitioner distributed a letter to the employees stating its opposition to the Union, including a warning which read: "They [the Union] are not doing anything for you except causing you to *risk everything* so they can collect tribute from you" (emphasis supplied) (Pet. App. 19-20; GCX 6).

In the early morning hours of Thursday, March 4, at the conclusion of the night shift, petitioner dis-

[1] All dates herein are in 1976, unless otherwise stated.

[2] Carpenters District Council of Houston and Vicinity, affiliated with United Brotherhood of Carpenters and Joiners of America.

[3] "Tr." refers to the transcript of the hearing before the administrative law judge; "RX" refers to petitioner's exhibits at that hearing; "GCX" refers to the General Counsel's exhibits.

charged ten night shift employees, all of whom had attended Union meetings and/or signed authorization cards for the Union. At that time, a letter from petitioner was read to them, asserting that a shortage of work had "caused us to discontinue our night fabrication work." (Pet. App. 26-27; Tr. 309, 315; GCX 7.) This action constituted the first such elimination of employees in petitioner's history; indeed, new employees were regularly told that they did not have to worry about layoffs. And no indication had been given prior to March 4 that such action would be taken (Pet. App. 27, 31, 32; Tr. 545, 600-601). When confronted by one of the dischargees with the allegation that the discharges were due to the union activity, Michulka nodded his assent (Pet. App. 34, 43 n. 1; Tr. 422, 433).

Later that day—Thursday, March 4—petitioner's vice president, Thomas J. Lee, made speeches to both the night and day shifts in which he stated that work had slackened off, that petitioner had recently acquired a similar company in Ohio, and that petitioner could transfer work from the Ohio plant if work slackened. Lee added, however, that petitioner would not transfer work from Ohio if the Union came in. (Pet. App. 25-26; Tr. 258, 260-261, 378-379, 382, 390, 536-539.)

Five days later, day shift welder James Hindman, a Union supporter, attended a Union meeting at which he was appointed as a witness to accompany the newly appointed in-plant committee when it informed petitioner's plant superintendent Raymond

Vajdak that they would be soliciting membership in the plant. On March 10, they met with Vajdak. Two days later, on March 12, Hindman was discharged, allegedly because of business conditions. (Pet. App. 27; Tr. 265, 272-276.)

2. On these facts, the Board, adopting the decision of the administrative law judge, found that petitioner had violated Section 8(a)(1) of the Act "[b]y threatening employees with loss of employment opportunities or other reprisals, and by interrogating employees concerning their union activity, membership and support." (Pet. App. 34.)

The Board further found that the discharges of March 4 and March 12 violated Section 8(a)(3) because they "were motivated by the employees' union activities, rather than the business conditions" (Pet. App. 30, 34-35). The Board rejected petitioner's contention that the discharges were caused by a decline in the firm's economic fortunes, noting that while the central element of that defense "was the alleged loss of one order and the postponement of two others[, d]etails of these transactions, including the size, scope and timing, and documentary evidence thereof (which must necessarily have existed in contracts of such magnitude) were not offered. Other evidence of its business conditions consisted, in part, of self-serving and vague documents some prepared after the fact." (Pet. App. 31.) The Board further noted inconsistencies in petitioner's arguments, such as (a) its statement in late December 1975 that 1976 would be even more successful than 1975, even though the alleged

cancellation and postponements which purportedly caused the decline were made that same month (Pet. App. 27-28, 31; Tr. 444-445); (b) petitioner's illustrative exhibits which showed that the backlog in March 1976 orders was higher than the previous "record year" (Pet. App. 31-32; RX 1, 9, 10); (c) the fact that petitioner "admitted [that] the early months of each year [were] its usual slow period" (Pet. App. 32; Tr. 37, 524); and (d) the fact that petitioner advertised for new workers in the months following the alleged December losses, and even after the March discharges (Pet. App. 33; Tr. 45-46, 606-607, 611-612; GCX 4).

Moreover, the Board found that, even assuming there had been economic justification for a layoff, a number of factors demonstrated that petitioner's "claimed justification" (Pet. App. 33) was not its actual motive for the discharges. Thus, the decision to discharge

> was made almost immediately upon the inception of the union activity and [petitioner's] acquisition of knowledge thereof. The discharges took place in the same time span and on the day between [petitioner's] antiunion letter and Lee's antiunion speeches. They also occurred in midweek, with no advance warning to the employees, and in the absence of any event which might have occasioned such precipitous action. [Pet. App. 31.]

Furthermore, the Board pointed out, petitioner "had met slow periods before without layoffs" and although

business allegedly began to slacken in December, petitioner "continued its overtime, 2 hours per day per employee plus Saturday work through January, and 1 hour per day even after the discharges in question" (Pet. App. 32; Tr. 342, 530, 545, 600-601). Rejecting petitioner's argument that reduction in overtime would have created a "morale problem," the Board stated (Pet. App. 32-33):

> It seems clear that discharges, after a history that did not even include layoffs, would be at least equally threatening to morale. Further, faced with an alleged economic situation warranting a reduction in profit margin, it is unlikely that [petitioner] would have rejected the savings potential of premium pay * * *. [W]hile there was no evidence of any permanent change in the pattern of [petitioner's] business, [petitioner] did not lay off the employees in question, [it] discharged them.

Finally, the Board noted supervisor Michulka's affirmation of the charge that the discharges were motivated by the Union activities[4] (Pet. App. 34).

ARGUMENT

Petitioner essentially contends that the Board improperly rejected its assertion that the discharges

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[4] The Board, contrary to the administrative law judge, found this affirmation to be violative of Section 8(a)(1) as well, since as "to employees who were not discharged, it was tantamount to a threat of similar treatment for them if they chose to engage, or continued to engage, in union activities" (Pet. App. 43 n.1).

were motivated by legitimate economic considerations. That contention raises only an evidentiary question that does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491 (1951).

Contrary to petitioner (Pet. 11-14), this decision is not in conflict with *Stone & Webster Engineering Corp.* v. *National Labor Relations Board*, 536 F. 2d 461 (1st Cir. 1976). As the First Circuit noted there (*id.* at 464), the "standard of review in considering the conclusion of the administrative law judge and the Board that the complainants were terminated in order to discourage membership in or activity on behalf of the Union is that of substantial evidence." In that case, the Court concluded that, where "the Board neither directly challenged the accuracy of the evidence concerning economic necessity nor affirmatively showed that it was a cloak for actual discriminatory motivation," the Board was not warranted in rejecting the assertions of economic justification. Here, however, the evidence did establish that the alleged economic necessity was a "cloak for actual discriminatory motivation": Not only did the timing directly coincide with the surfacing of the organizational campaign, but petitioner's vice president, in explaining the situation immediately after the March 4 discharges, effectively told the employees that work would have been transferred to them from a newly acquired plant *but for* the Union activity. Furthermore, as the Board explained, the terminations occurred precipitously in mid-week and were labeled

discharges, rather than layoffs, even though there was no indication that the alleged drop in business was permanent and petitioner had a history of retaining workers through slow periods. Finally, one of petitioner's supervisors admitted that anti-union animus was the cause of the discharges.

The Board did not rely only on petitioner's failure to substantiate loss of business in rejecting that defense. Rather, in finding the assertion to be pretextual, it noted that petitioner continued substantial regular overtime after the alleged order cancellations and postponements and even after the discharges, had a high backlog of orders for March, and continued advertisement for new workers. This was not, as petitioner contends (Pet. 13), simply to rely on the General Counsel's *prima facie* showing of discriminatory motivation: the Board found evidence that overwhelmingly demonstrated that protected union activity, rather than petitioner's alleged economic condition, was the cause of the discharges.[5]

Nor is there merit to petitioner's contention (Pet. 13-14) that the instant case presents a conflict between the various circuits as to the standard to be applied in discriminatory discharge cases where there exist both proper and improper motives for discharge.

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[5] Therefore *Furnco Construction Corp.* v. *Waters*, No. 77-369 (June 29, 1978), where, in a Title VII context, a bare *prima facie* case of discrimination was insufficient to support a finding of discrimination where business justification for the employer's practices was presented, is of no aid to petitioner.

The Board did not find that petitioner was motivated by union *and* economic considerations. Rather, the Board concluded that, even if business actually declined, the claim that the discharges were predicated on any decline was pretextual. (Pet. App. 33.) Therefore, any difference among the circuits as to the "'quantum of animus'" (Pet. 13) which must be proven in mixed motive cases is irrelevant here. This case affords no occasion to decide that question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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